

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(COMM) 221/2017 & I.A.A 12707/2015**

EKO INDIA FINANCIAL SERVICES PVT. LTD. Plaintiff
Through Mr. Sumit Roy, Advocate

versus

MR. SUSHIL KUMAR YADAV Defendant
Through None

%

Date of Decision: 8th August, 2017

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J (Oral):

1. Present suit has been filed for permanent injunction restraining infringement of trade mark, passing off, damages, rendition of accounts delivery up etc. The prayer clause in the suit is reproduced hereinbelow:-

“a) an order of permanent injunction restraining the Defendant, and their proprietors, partners or directors, as the case may be, its principal officers, servants, and agents, and all others acting for and on behalf of the Defendants, from advertising, and directly or indirectly dealing in any services or businesses whatsoever, under the trademark, trade name or company name EKO or under any other mark

or name as may be identical to or deceptively similar with the Plaintiff well-known trademark and trade name EKO in any manner, including use of EKO on or in relation to its corporate name or for any other purpose, including use as part of a domain name, text on any website, in meta-data, purchased keywords, or by any other means by which Internet websites or content might be found or indexed through use of a search engine or otherwise, amounting to infringement of the Plaintiff registered trademarks;

b) an order of permanent injunction restraining the Defendant and, their proprietors, partners or directors, as the case may be, its principal officers, servants, and agents, and all others acting for and on behalf of the Defendants, from advertising, and directly or indirectly dealing in any services or businesses whatsoever, under the trademark, trade name or company name EKO or under any other mark or name as may be identical to or deceptively similar with the Plaintiff well-known trademark and trade name EKO, or the get-up/colour combination/trade dress used in relation thereto, in any manner including use of the EKO mark or name as part of, or in relation to, its corporate name or for any other purpose, so as to cause confusion or deception leading to passing off of the Defendants' services or businesses as those of the Plaintiff, and unfair competition;

c) an order of permanent injunction restraining the Defendant, and their proprietors, partners or directors, as the case may be, its principal officers, servants, and agents and all others acting for and on behalf the Defendants from using the EKO trademark, trade name and company name in its advertisements or otherwise so as to cause any loss of reputation to the Plaintiff which would amount to dilution/tarnishing of the Plaintiff trademarks;

d) an order of permanent injunction restraining the Defendant, and their proprietors, partners or directors, as the case may be, its principal officers, servants and agents,

and all others acting for and on behalf of the Defendants from displaying images or disseminate information of the projects being developed by the Plaintiff through any electronic media or platform or otherwise;

e) That the Registrar of the impugned domain name www.ekopay.in be directed to the transfer the impugned domain name in favour of the Plaintiff;

f) an order for damages of Rs.20,10,000/- (Rupees Twenty Lakh Ten Thousand Only) to be paid by the Defendants on account of publicity and use of the impugned trademark and trade name EKO, and also for loss of reputation.

g) an order of rendition of account of profit illegally earned by the Defendants on account of use of the impugned trademark and grant of a decree in favour of the Plaintiff for the amount so ascertained;

h) an order for delivery up by the Defendants of all goods including Boards/hoardings, stickers, letter heads, visiting cards, publicity/promotional materials, pamphlets, etc., bearing the impugned mark or name EKO to the Plaintiff, for the purposes of destruction;

i) An order for costs of the proceedings; and

j) Any further orders as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

2. At the outset, learned counsel for the plaintiff states that the plaintiff confines its prayer to prayer (a), (b), (d) and (e) of the prayer clause.

3. Vide order dated 19th March, 2015, this Court restrained the defendant by way of an ex parte interim injunction from using the mark EKO. The relevant portion of the order dated 19th March, 2015 is reproduced hereinbelow:-

“Consequently, till further orders, defendants, its proprietors, partners or directors, its principal officers, servants, employees and agents and all other acting for and on behalf of the defendants are restrained from using, advertising, offering for sale or otherwise directly or indirectly dealing in any goods or services under the trademark, trade name or company name EKO or under any other mark or name identical to or deceptively similar with the plaintiff's mark and/or the get up/colour combination/trade dress used in relation thereto, in any manner including use of the EKO mark.”

4. Though the defendant was duly served, yet none entered appearance on behalf of defendant. Accordingly, defendant was proceeded ex parte vide order dated 01st September, 2016.

5. In the plaint, it has been averred that plaintiff is one of the leading companies and a front runner assisting various banking institutions in India and as such has been instrumental in enhancing financial inclusion in the Indian banking sector. The plaintiff through mobile-based platform, caters to more than 150,000 consumers providing services relating to banking, savings, payment, merchant transactions, bill payment and cash collection. Its product and services include banking and money transfer; recharge facility services for mobile and DTH operators in India; and cash management services and cash disbursal services to Government Enterprises, micro finance institutions and large, medium and small scale enterprises.

6. It has been further averred in the plaint that the plaintiff first

adopted the invented mark EKO as a trademark and trading style in the year 2007 and the same has been widely promoted in India for several years in the field of economics and banking sector and to the public at large. The plaintiff has received awards, recognition and accolades in respect of plaintiff's business, services and products under the EKO trademarks. The mark EKO forms a part of plaintiff's domain name i.e. www.eko.co.in.

7. It has been also averred that the plaintiff's mark EKO has been registered in Classes 35 and 36 under the Trade Marks Act, 1999.

8. Learned counsel for plaintiff states that plaintiff became aware of the defendant using the mark EKO PAY in July, 2014 through its impugned website www.ekopay.in. He states that plaintiff sent a Cease and Desist letter on 13th August, 2014, but no reply has been received till date.

9. Mr. Sumit Roy, learned counsel for plaintiff contends that the impugned trade mark EKO PAY is phonetically, visually and structurally deceptively similar to the trade mark of the plaintiff EKO and the defendant has unimaginatively added the non-distinctive and descriptive word PAY to the impugned mark. He also states that defendant has adopted the impugned mark and impugned domain name for an identical set of services rendered by the plaintiff and therefore, there is a real and tangible risk that consumers and members of trade will be confused or deceived into believing that such services actually originate from the plaintiff or are rendered with the consent or license of the plaintiff or that the defendant has some commercial nexus with the defendant.

10. The plaintiff has filed its evidence by way of an affidavit of PW1-Mr. Anupam Verghese.

11. The plaintiff's witness has proved the copies of trade mark registration certificates in favour of the plaintiff as Ex.PW1/4 and Ex.PW1/5. The PW1 has further proved the pictures of award and recognition received by the plaintiff as Ex.PW1/3. PW1 has also proved the copy of Cease and Desist letter dated 13th August, 2014 along with its proof of service as Ex.PW1/7.

12. Having heard learned counsel for plaintiff as well as having perused the papers, this Court is of the view that due to extensive use over a substantial period of time, the plaintiff's EKO mark has acquired reputation and goodwill.

13. Further, as the plaintiffs' evidence has gone unrebutted, said evidence is accepted as true and correct. Consequently, the allegation that the trademark EKO used by defendant on the website www.ekopay.in amounts to infringement of plaintiff's mark EKO, is accepted. The use of impugned mark by the defendant was bound to cause incalculable loss of reputation and loss of sales to the plaintiff.

14. Keeping in view the aforesaid facts, the suit is decreed in terms of prayers (a), (b), (d) and (e) of the prayer clause.

15. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

AUGUST 08, 2017

mk/rn